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IN THE SUPERIOR COURT OF STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

v.

STEVEN CARROLL DEMOCKER,

Defendant.

Cause No. P1300CR20081339

Division 6

STATE'S RESPONSE TO DEFENDANT'S
MOTION IN LIMINE RE HEARSAY
EVIDENCE FILED APRIL 9, 2010

The State of Arizona, by and through Sheila Sullivan Polk, Attorney, and her deputy undersigned, hereby submits its Response to Defendant's Motion in Limine re Hearsay Evidence and requests that Defendant's Motion be denied. The State's position is supported by the following Memorandum and Points of Authority.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Certain hearsay evidence is admissible under Ariz. R. Evid., Rule 803 and 804.

Ariz. R. Evid., Rules 803 and 804 allow for admission of certain types of hearsay. The materials the State will seek to admit fall squarely under firmly rooted exceptions and should not be precluded.

Rule 803 (1), (5) and (24) provide that the following are not excluded by the hearsay rule and the availability of the declarant is immaterial.

1 (1) *Present sense impression.* A statement describing or
2 explaining an event or condition made while the declarant was
perceiving the event or condition, or immediately thereafter.

3 (5) *Recorded Recollection.* A memorandum or record
4 concerning a matter about which a witness once had
5 knowledge but now has insufficient recollection to enable the
6 witness to testify fully and accurately, *shown to have been*
7 *made or adopted by the witness when the matter was fresh in*
8 *the witness' memory and to reflect that knowledge correctly.*
If admitted, the memorandum or record may be read into
evidence but may not itself be received as an exhibit unless
offered by an adverse party.

9 (24) *Other exceptions.* A statement not specifically covered by
10 any of the foregoing exceptions but having equivalent
11 circumstantial guarantees of trustworthiness, if the court
12 determines that (A) *the statement is offered as evidence of a*
13 *material fact; (B) the statement is more probative on the point*
14 *for which it is offered than any other evidence which the*
15 *proponent can procure through reasonable efforts; and (C)*
16 *the general purposes of these rules and the interests of justice*
17 *will best be served by admission of the statement into*
18 *evidence.* However, a statement may not be admitted under this
exception unless the proponent of it makes known to the
adverse party sufficiently in advance of the trial or hearing to
provide the adverse party with a fair opportunity to prepare to
meet it, the proponent's intention to offer the statement and the
particulars of it, including the name and address of the
declarant.

19 (emphasis added.)

20 Rule 804(a)(4) allows that a witness is unavailable if he or she "is unable to be
21 present or to testify at the hearing because of death." Here, the victim is unavailable because
22 she was brutally murdered. Rule 804(b) states "[t]he following are not excluded by the
23 hearsay rule if the declarant is unavailable as a witness:

24 (4) *Statement of personal or family history.* (A) *A statement*
25 *concerning the declarant's own ... divorce.*

26 (7) *Other exceptions.* A statement not specifically covered by

1 *any of the foregoing exceptions but having equivalent*
2 *circumstantial guarantees of trustworthiness, if the court*
3 *determines that (A) the statement is offered as evidence of a*
4 *material fact; (B) the statement is more probative on the point*
5 *for which it is offered than any other evidence which the*
6 *proponent can procure through reasonable efforts, and (C)*
7 *the general purposes of these rules and the interests of justice*
8 *will best be served by admission of the statement into*
9 *evidence.* However, a statement may not be admitted under this
exception unless the proponent of it makes known to the
adverse party sufficiently in advance of the trial or hearing to
provide the adverse party with a fair opportunity to prepare to
meet it, the proponent's intention to offer the statement and the
particulars of it, including the name and address of the
declarant.

10 The State believes Defendant brutally bludgeoned Carol to death in order to be free
11 from the obligations of the \$6,000 per month spousal support the divorce court had ordered
12 in the final divorce decree on May 28, 2008, and to obtain control over Carol's \$750,000 life
13 insurance. There are numerous communications, both hand-written and electronic via text
14 messaging and emails, between Carol, Defendant and others made during the last weeks of
15 the divorce and shortly before Carols' death which are directly related to the divorce and
16 Defendant's fragile financial condition. There are also text messages between Carol and
17 Charlotte discussing the rain on July 1, 2010. If the Court will recall, there is dispute
18 whether it rained at the Bridal Path residence the day before Carol was killed. These are
19 statements "*offered as evidence of a material fact, ... more probative on the point for which*
20 *it is offered than any other evidence which the proponent can procure through reasonable*
21 *efforts, and ... justice will best be served by admission of the statement into evidence.*"
22 Rule 803(24) and 804(7).

23 These communications have been discussed in nearly every pretrial hearing to date
24 and at no time has Defendant challenged their veracity. The email communications have
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26

1 been discovered as both printed documents and as electronic media on the numerous
2 computers examined in this case. The emails were printed multiple times and in Carol's
3 possession as they were found in the *Body and Soul* magazine found on the kitchen counter,
4 YCSO Evidence Item 902, with her hand-written notes on them, and in the yellow folder
5 located in her green luggage bag along with stamped envelopes of bills to pay, YCSO
6 Evidence Item 836. Many of these were admitted during the *Chronis* Hearing. The text
7 messages were discovered stored in the actual cell phones and printed during the DPS
8 forensic examination of the phone, YCSO Evidence Item 34, Bates Nos. 4453, 4455-4457.
9 Carol's statements from the cell phone text messages, emails and other communications fall
10 under the firmly rooted exception of Rule 803(1), (5) and (24) and are clearly admissible
11 under Rule 804 (4) and (24). Defendant's request for preclusion must be denied.
12

13
14 ***II. The emails and text messages are not testimonial in nature and their admission will
not violate Defendant's confrontational rights.***

15 "Crawford v. Washington, 541 U.S. 36, 51, 124 S.Ct. 1354, (2004), prohibits the
16 government from introducing the out-of-court statements of an unavailable witness if such
17 statements are 'testimonial' in nature." *United States v. Vaghari*, 2009 WL 2245097
18 (E.D.Pa.) at *8. Here, the emails and text messages are clearly not "the functional
19 equivalent" of in-court testimony, "formalized testimonial materials," or intended "for use at
20 a later trial," and are therefore not testimonial. *Crawford*, 541 U.S. at 52, 124 S.Ct. 1354.
21 "As the emails ... are not testimonial, they are not within the purview of *Crawford* and
22 ***their admission will not violate defendant's confrontation rights.***" *Vaghari* at *8 (citing
23 *United States v. Hunter*, 266 F. App'x 619, 622 (9th Cir.2008)) (emphasis added).
24 Defendant's claim that admission of this hearsay evidence violates *Crawford* fails.
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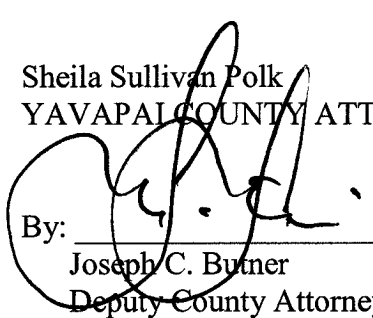
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1 **CONCLUSION:**

2 In *Lilly v. Virginia*, 527 U.S. 116, 119S.Ct. 1887 (1999), the United States Supreme
3 Court concluded that when a court can be confident, as in the context of hearsay falling
4 within a firmly rooted exception, the a declarant's truthfulness is so clear from the
5 surrounding circumstances that the test of cross-examination would be of marginal utility, the
6 Sixth Amendment allows the admission of the declarant's statements. Defendant's Motion *in*
7 *Limine* to prohibit the State from offering hearsay testimony should be denied.
8

9 RESPECTFULLY SUBMITTED this 19 April, 2010.

11 Sheila Sullivan Polk
12 YAVAPAI COUNTY ATTORNEY

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14 By: 
15 Joseph C. Butner
16 Deputy County Attorney
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COPIES of the foregoing delivered this
19th day of April, 2010 to:

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